173

No. 10-427

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In The
Supreme Court of the United States

RODNEY MILLER,

Petitioner,

v.

MONUMENTAL LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit:

1. Rodney Miller, Petitioner and Appellant below.
2. Monumental Life Insurance Company, Respondent and Appellee below.

CORPORATE DISCLOSURE STATEMENT

Respondent Monumental Life Insurance Company is 100% owned by Capital General Development Corporation. The parent company is not publicly traded. Both Monumental Life Insurance Company and its parent are members of the AEGON Group. The AEGON Group, through its member companies, is a leading international insurance group with its headquarters in The Hague, the Netherlands. The principal market for common shares of AEGON, N.V. is Euronext Amsterdam. Common shares of AEGON N.V. are listed on the NYSE and the Frankfort, London, and Tokyo exchanges as well as the SWX Swiss Exchange.

TABLE OF CONTENTS

	Page
STATEMENT	1
A. Petitioner's ERISA Claim	1
B. Petitioner's Lawsuit	2
C. Court of Appeals Reversal	3
D. District Court Remands Matter	3
E. Petitioner's Second Appeal	5
F. Petition for Writ of Certiorari	5
SUMMARY OF THE ARGUMENT	6
ARGUMENTS	9
A. Jurisdiction and 28 U.S.C. § 1291	9
B. Finality of Remand Orders	10
C. Remand Not Practically Final	12
D. Other Tenth Circuit Cases	13
DISTRICT COURT – REMAND COURT OF APPEALS – NO JURISDICTION	17
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Abram v. Cargill, Inc., 395 F.3d 882 (8th Cir. 2005) 12

Behrens v. Pelletier, 516 U. S. 299 (1996) 9

Borntrager v. Central States, Southeast and Southwest Areas Pension Fund, 425 F.3d 1087 (8th Cir. 2005) 12

Bowers v. Sheet Metal Workers' Nat'l Pension Fund, 365 F.3d 535 (6th Cir. 2004) 12

Caldwell v. Life Ins. Co. of N. Am., 287 F.3d 1276 (10th Cir. 2002) 11, 16

Catlin v. United States, 324 U.S. 229 (1945) 11

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949) 9

DeGrado v. Jefferson Pilot Financial Ins. Co., 451 F.3d 1161 (10th Cir. 2006) 16

Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co., 491 F.3d 1180 (10th Cir. 2007) 13, 14, 15, 16

Gallo v. Amoco Corp., 102 F.3d 918 (7th Cir. 1996) 16

Garner v. U.S. West Disability Plan, 506 F.3d 957 (10th Cir. 2007) 11

Giraldo v. Building Service 32B-J Pension Fund, 502 F.3d 200 (2nd Cir. 2007) 12

TABLE OF AUTHORITIES – Continued

Page

Graham v. Hartford Life & Accident Ins. Co., 501 F.3d 1153 (10th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1650, 170 L.Ed.2d 354 (2008) 10, 11

Hackett v. Xerox Corp. Long-Term Dis. Inc. Plan, 315 F.3d 771 (7th Cir. 2003) 17

Hensley v. Northwest Permanente P.C. Ret. Plan & Trust, 258 F.3d 986 (9th Cir. 2001) 12

Johnson v. Jones, 515 U. S. 304 (1995) 9

Metzger v. UNUM Life Ins. Co. of Am., 476 F.3d 1161 (10th Cir. 2007) 11

Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975 (7th Cir. 1999) 12

Petralia v. AT&T Global Information Solutions Co., 114 F.3d 352 (1st Cir. 1997) 12

Rekstad v. First Bank System, Inc., 238 F.3d 1259 (10th Cir. 2001) 11

Scruggs v. ExxonMobil Pension Plan, 585 F.3d 1356 (10th Cir. 2009) 16

Shannon v. Jack Eckerd Corp., 55 F.3d 561 (11th Cir. 1995) 12

U.S. v. Nixon, 418 U.S. 683 (1974) 7

Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154 (4th Cir. 1993) 17

Will v. Hallock, 546 U.S. 345 (2006) 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254 .....7, 18

28 U.S.C. § 1291 .....*passim*

STATEMENT

A. Petitioner's ERISA Claim

This case arises from Petitioner's claim for benefits under an ERISA plan (the "Plan") after he allegedly suffered a work-related injury to his back and neck in a motor vehicle accident. Certain of the Plan benefits were backed by an insurance policy issued by Respondent. The Plan did not grant the Plan administrator discretionary authority. Petitioner asserted a claim for Continuous Total Disability ("CTD") benefits under the Plan. To be entitled to CTD benefits, Petitioner had to establish: (a) he was "Totally Disabled" as defined by the Plan,[1] (b) he had been granted a Social Security Disability Award ("SSD Award") by the Social Security Administration ("SSA"), (c) his Total Disability resulted solely and directly from the work-related injury, and (d) the Total Disability was reasonably expected to continue without interruption until Petitioner died. Petitioner submitted to the Plan with his claim for CTD benefits the SSA's decision denying his application for an SSD Award and the SSA's decision conditionally approving his application for a Supplemental Security Income Award ("SSI Award"), along with certain documents he had submitted to the SSA in connection with his application for the SSD and SSI Awards. Petitioner submitted no

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[1] "Total Disability" and "Totally Disabled" are defined in the Plan as the insured being "unable to perform every duty pertaining to any occupation for which he is or may become qualified by education, training or experience."

other evidence establishing the other requirements for CTD benefits under the Plan. Petitioner's claim was denied by the Plan administrator. In the denial letter, the administrator stated the Plan required Petitioner be unable to engage in any gainful employment and be awarded a SSD Award by the SSA for injuries suffered in the work-related accident. The administrator went on to state the information provided by the Petitioner indicated he was awarded an SSI Award and not an SSD Award as required by the Plan.

B. Petitioner's Lawsuit

Petitioner filed a lawsuit for ERISA Plan benefits claiming the Plan administrator's benefit decision was incorrect. In his petition, Petitioner alleged he was entitled to CTD benefits under the Plan as he was disabled "due to the combined effects of chronic back and neck pain associated with facet arthropathy with cervical and lumbar radiculopathy, carpal tunnel syndrome, bi-polar affective disorder and valvular heart disease with valve replacement." He also alleged the SSA's SSI Award made him eligible for CTD benefits under the Plan. Both parties moved for summary judgment. The District Court granted Respondent's summary judgment motion finding the SSI Award did not meet the Plan's requirement for an SSD Award. The District Court did not address the "sole cause" issue (whether any Total Disability resulted solely and directly from a work-related injury) or any other issues. Petitioner appealed.

C. Court of Appeals Reversal

On December 20, 2007, the Tenth Circuit Court of Appeals issued its decision reversing the District Court's summary judgment. The Court of Appeals held Petitioner's SSI Award coupled with the SSA's finding of disability was sufficient to satisfy the Plan's requirement of a SSD Award. The Court of Appeals remanded the case to the District Court to address the "sole cause" issue. Petitioner did *not* appeal this decision of the Court of Appeals, including the Court of Appeals' decision to remand the matter to the District Court to address the sole cause issue.[2] The Court of Appeals' decision became final.

D. District Court Remands Matter

After the case was remanded, Respondent obtained surveillance video of Petitioner[3] that clearly

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[2] It was clear at this point that the District Court would consider a coverage issue at the district court level that was not specifically raised by the Plan administrator at the administrative level and/or that was not clearly set out in the claim denial letter.

[3] In this video, Petitioner is seen approaching the rear of a sports utility vehicle ("SUV"), lifting two 40 pound bags of rock salt (one in each hand) from the back of the SUV and carrying same into the garage of a house. He does this three separate times, each time effortlessly lifting a 40 pound bag of salt in each hand and easily and freely walking and carrying same into the garage. He is also seen vigorously walking, carrying and operating a gas-powered blower and climbing in and out of a sedan. He then undertakes to "detail" the SUV, including bending, stooping and vigorously vacuuming the SUV's front

(Continued on following page)

cast doubts on Petitioner's claim that he is or ever was "Totally Disabled." The parties provided additional briefing on the sole cause issue, waiver, estoppel and the Plan requirements for CTD Benefits. Respondent pointed out that Petitioner had not established the right to CTD Benefits under the Plan. Respondent also briefed the issue of the appropriate remedy and remand to the Plan administrator. The only evidence before the District Court on its *de novo* review was the SSA's decisions on Petitioner's request for a SSD and SSI Awards and the documents associated with Petitioner's request for such Awards.

The District Court held (a) Petitioner had the burden of proving his entitlement to benefits under the ERISA plan, (b) the Court's *de novo* review was restricted to the administrative record, (c) Respondent failed to provide adequate findings and failed to adequately explain the grounds for denial of benefits in the claim denial letter, and (d) such failure did not automatically entitle Petitioner to benefits under the Plan. The Court determined that remand to the Plan administrator was the appropriate remedy. The District Court also held that principles of waiver and estoppel could not be used to modify the express terms of the ERISA Plan and that on remand to the

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and rear floors, scrubbing floor mats, scrubbing the sides of the SUV, climbing up a ladder to scrub and wash the top of the SUV while standing at the top of the ladder and easily reaching across the top of the SUV, and scrubbing and cleaning the inside of the SUV.

Plan administrator, Petitioner had the burden to establish that he was entitled to the benefits under the Plan's terms, including the requirement to show he was "Totally Disabled" as defined by the Plan and that any Total Disability resulted solely and directly from a work-related injury.

E. Petitioner's Second Appeal

Petitioner appealed the District Court's order remanding the matter to the Plan administrator. On April 28, 2010, the Court of Appeals issued its decision dismissing Petitioner's second appeal for lack of jurisdiction. The Court of Appeals set out the parties' contentions, including Respondent's assertion that the Court of Appeals lacked jurisdiction over the District Court's remand order. The Court of Appeals first addressed the jurisdictional issue discussing 28 U.S.C. § 1291, Tenth Circuit case law requiring a case-by-case analysis, and the Tenth Circuit's "practical finality" rule (under this rule, a district court's remand order is a final order if the order's practical effect makes an important legal question effectively unreviewable). The Court concluded the District Court's order remanding the case to the Plan administrator was not a final decision and, thus, the Court of Appeals lacked jurisdiction. The Court of Appeals dismissed the Appeal.

F. Petition for Writ of Certiorari

In his Petition for Writ of Certiorari, Petitioner claims the Court of Appeals' decision creates "a clear

circuit conflict." Petitioner then identifies what he perceives as this "clear circuit conflict" – whether an ERISA plan administrator can support its claim denial at the district court level based upon other coverage provisions not fully explained in the administrator's denial letter or not reached by the administrator, and in such situations, whether the administrator is estopped to require or can waive the Plan requirement that the claimant establish the right to receive plan benefits. However, while the Court of Appeals identified this issue as one raised by Petitioner, it did not rule on this or any other substantive issue. Rather, as noted above, the Court of Appeals dismissed the appeal for lack of jurisdiction finding the District Court's order remanding the matter to the Plan administrator was not a final decision under 28 U.S.C. § 1291 and Tenth Circuit's case law interpreting this statute.

SUMMARY OF THE ARGUMENT

Contrary to Petitioner's assertion, this case does *not* present an issue of an ERISA plan denying a benefit claim at the administrative level for one reason and then the district court upholding the claim denial based upon a different reason first raised by the plan administrator at the District Court level. The District Court in this case did *not* uphold Respondent's claim denial. Rather, the District Court found procedural irregularities and/or violations by the Plan administrator and remanded the matter to

the Plan administrator giving Petitioner a full opportunity to establish coverage and his entitlement to the Plan's CTD Benefits. The opinion of the Court of Appeals from which Petitioner files his Petition did *not* decide any issue other than a jurisdictional issue.

The threshold question presented is whether the order of the District Court was an appealable order and whether this case was properly "in the Court of Appeals" under 28 U.S.C. § 1254 when the Petition for Certiorari was filed in this Court. *U.S. v. Nixon*, 418 U.S. 683, 690 (1974). The Court of Appeals' jurisdiction under 28 U.S.C. § 1291 encompasses only "final decisions of the district courts." Petitioner's Writ of Certiorari is not properly before this Court for consideration as the District Court's order was not a final decision. *Nixon, supra*. Furthermore, this case does not fit into the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Nixon, supra*.

The Court of Appeals correctly concluded that the District Court's Order remanding the matter to the Plan administrator was not a final, appealable decision. The Court of Appeals correctly concluded that the remand Order did not make any important legal question effectively unreviewable under the Tenth Circuit's "practical finality" rule (the "practical finality" rule is similar to this Court's "collateral order" doctrine). Furthermore, the issue of whether the Plan administrator could at the District Court level raise coverage issues if such issues were not fully explained

in the claim denial letter was *not* ruled upon by the Court of Appeals in its latest decision and, thus, is not properly before this Court.[4]

The issue Petitioner raises in his Writ – whether Respondent can, *at the District Court level*, rely upon the coverage issues to uphold the claim denial when same were not clearly articulated as reasons in the claim denial letter, was not decided by the Court of Appeals. Furthermore, the District Court did not uphold the Plan administrator's claim denial based upon a coverage issue not fully explained in the claim denial letter. Rather, the District Court remanded the matter to the Plan administrator to allow Petitioner to present evidence and the Plan administrator to consider whether Petitioner established his entitlement to CTD Benefits under the terms of the Plan. Remand to the Plan administrator was the proper remedy as the evidence before the District Court did not establish that Petitioner was entitled to CTD Benefits under the Plan and the District Court found various procedural irregularities, including the claim denial letter failing to provide adequate findings and to adequately explain the grounds for denial of Petitioner's claim for CTD Benefits.

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[4] To the extent this issue was ruled on in the Court of Appeals' first decision, Petitioner did not appeal that decision and it became final.

ARGUMENTS

A. Jurisdiction and 28 U.S.C. § 1291

The Court of Appeals properly relied upon 28 U.S.C. § 1291 and Tenth Circuit case law in holding the District Court's remand order was not a final decision and, thus, the Court of Appeals was without jurisdiction. The Court of Appeals properly dismissed Petitioner's appeal.

Section 1291 provides that the courts of appeals shall have jurisdiction of appeals "from all final decisions of the district courts of the United States." Under this statute, appeals before the end of district court proceedings "are the exception, not the rule." *Johnson v. Jones*, 515 U.S. 304, 309 (1995). Through practical construction, this Court has crafted a narrow category of prejudgment orders that are immediately appealable under the "collateral order" doctrine. *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). Under this doctrine, orders that "finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" are immediately appealable. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The requirements for collateral order appeal are that an order "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a

final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006).

In the instant case, the District Court's remand order does not conclusively determine a disputed issue and is not effectively unreviewable on appeal from a final judgment. The order remanding the matter to the Plan administrator does not prevent Petitioner from returning to the District Court should he be dissatisfied with the Plan administrator's decision on remand or from raising in the District Court at such time the very issues he now raises. As the Court of Appeals determined, the remand to the Plan administrator does not prevent eventual and effective appellate review of Petitioner's contentions that Respondent waived the requirement that he establish that he is entitled to the CTD benefits under the Plan or that Respondent is estopped to raise such requirements by not specifically raising his failure to establish these Plan requirements in the initial claim denial letter.

B. Finality of Remand Orders

This Court recently denied Writ of Certiorari in a Tenth Circuit case wherein the Court of Appeals held the District Court's order remanding a case to an ERISA plan administrator was *not* a "final decision of the District Court" under § 1291. *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153, 1154 (10th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1650, 170 L.Ed.2d 354 (2008). In *Graham*, the Court of

Appeals quoted § 1291 stating a "final decision" was one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 1156 (*quoting Rekstad v. First Bank Sys.*, 238 F.3d 1259, 1261 (10th Cir. 2001) (*quoting Catlin v. United States*, 324 U.S. 229, 233 (1945))). The Court went on to discuss the Tenth Circuit's case-by-case approach, the "practical finality rule" and the "comparatively strict collateral order doctrine" utilized by other circuits. Under the "practical finality rule," the Court will review an order remanding a matter to an administrative agency when it is necessary to ensure that the court can review important legal questions which a remand may make "effectively unreviewable," because administrative agencies "may be barred from seeking district court (and thus circuit court) review of their own administrative decisions." *Graham,* 501 F.3d at 1158. The Court applied the practical finality rule and held the District Court's remand order was not a final decision ending the litigation on the merits.

Other Tenth Circuit cases have also held District Court remand orders were not final decisions under § 1291. *Garner v. U.S. West Disability Plan*, 506 F.3d 957 (10th Cir. 2007); *Metzger v. UNUM Life Ins. Co. of Am.*, 476 F.3d 1161 (10th Cir. 2007); *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1288 (10th Cir. 2002); *Rekstad v. First Bank System, Inc.*, 238 F.3d 1259 (10th Cir. 2001).

Other Circuit Courts have likewise held that an order remanding an ERISA case to a plan administrator for further consideration is not a final appealable

judgment. *See Petralia v. AT&T Global Information Solutions Co.*, 114 F.3d 352 (1st Cir. 1997); *Bowers v. Sheet Metal Workers' Nat'l Pension Fund*, 365 F.3d 535, 536 (6th Cir. 2004); *Borntrager v. Central States, Southeast and Southwest Areas Pension Fund*, 425 F.3d 1087 (8th Cir. 2005); *Abram v. Cargill, Inc.*, 395 F.3d 882, 886 (8th Cir. 2005) ("A reviewing court must remand a case when the court or agency fails to make adequate findings or explain the rationale for its decision."); *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995).

The Seventh and Ninth Circuits hold appeal may be appropriate in certain circumstances. *See, Hensley v. Northwest Permanente P.C. Ret. Plan & Trust,* 258 F.3d 986, 992-93 (9th Cir. 2001); *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 979-80 (7th Cir. 1999). The Second Circuit has not decided on the issue. *Giraldo v. Building Service 32B-J Pension Fund*, 502 F.3d 200, 202 (2nd Cir. 2007).

C. Remand Not Practically Final

The Court of Appeals correctly held that the District Court's order remanding the matter to the Plan administrator was not a final decision under § 1291 and the "practical finality" doctrine. The Court of Appeals correctly found that the issue asserted by Petitioner – whether Respondent could raise coverage issues that were not clearly and specifically addressed by the Plan administrator in its initial denial

letter – was not effectively unreviewable. The Court of Appeals correctly pointed out that if, on remand, the Plan administrator denied Petitioner's claim for CTD Benefits based upon coverage issues not clearly and specifically discussed in the initial claim denial letter, then judicial review of such decision, as well as whether the Plan administrator was allowed to rely upon these coverage issues, was available to Petitioner. In that the remand order was not a final decision and was not practically final, the Court of Appeals properly dismissed the appeal for lack of jurisdiction.

D. Other Tenth Circuit Cases

Petitioner states that the District Court and Court of Appeals' decisions in this case are in conflict with the Tenth Circuit's decision in *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180 (10th Cir. 2007). However, a review of the *Flinders* case reveals it in no way supports Petitioner's position, and, in fact, supports the District Court's rulings in this matter, including the remand of this matter to the Plan administrator.

In *Flinders*, employees covered by two collective bargaining agreements sought certain benefits provided to the company's employees under a certain workforce ERISA plan ("WFSP"). The plan administrator denied the employees' claim asserting there was no reference to or inclusion of the WFSP in the collective bargaining agreements, as specifically required by the WFSP for payment of the benefits

sought by the employees. The employees filed suit. In an attempt to support its denial at the district court level, the plan relied upon an additional reason for denial claiming the WFSP was not "a plan arranged by the Company for its employees" and therefore was not included in the collective bargaining agreements. The District Court relied upon this reasoning in granting summary judgment. The Court of Appeals reversed holding the plan administrator violated ERISA in asserting this additional reason for denial and the District Court erred in granting summary judgment based upon this reason. The Court of Appeals then addressed the reason given by the administrator and concluded such reason was not supported by the language of the plan, and that under the plan's unambiguous language, there was reference to and inclusion of the WFSP in the collective bargaining agreements.

The *Flinders* Court then addressed the issue of the *appropriate remedy*. The Court stated it could "either remand the case to the plan administrator for a renewed evaluation of the claimant's case" or "order an award of benefits." If the plan administrator failed to make adequate factual findings or failed to adequately explain the grounds for the decision, then the proper remedy was to remand the case for further findings or additional explanation. However, "if the evidence in the record clearly shows that the claimant is entitled to benefits, an order awarding such benefits is appropriate."

The *Flinders* Court specifically stated that while it did not consider the plan's additional reason *in deciding whether to uphold the District Court's summary judgment* for the plan, the Court **could not "ignore it for purposes of formulating an appropriate remedy"** and that it was not "this Court's function *ab initio* to apply the correct standard to the participant's claim." The Court then addressed in detail why and how the evidence clearly established that the WFSP was "arranged by the Company for its employees" and how it would be patently unreasonable for the plan to deny benefits on the basis that the WFSP was not arranged by the Company for its employees. The Court concluded that the plan's position on this issue was "untenable," that it would be "unreasonable" to deny benefits based upon this ground, and there was no point in remanding the case so that the Plan could again deny benefits, only to be reversed a second time on appeal. The *Flinders* Court concluded that the case before it was one where a remand was unnecessary and an award of benefits was appropriate as the plaintiffs had shown and the evidence established their entitlement to same.

Nowhere in *Flinders* did the Court state or hold that the plan administrator was estopped to raise or waive the requirements of the ERISA plan for benefits. In fact, the *Flinders* Court fully considered the merits of the issue that was first raised by the plan administrator at the district court level. In that the evidence clearly refuted this "additional" reason for denial of the claim, the *Flinders* Court determined

remand was not necessary. Nowhere in *Flinders* did the Court state that an ERISA plan participant is entitled to plan benefits without meeting the requirements clearly and unambiguously stated in and required by the plan for such benefits. In the case at bar, remand was necessary for the development and consideration of additional evidence on the issue of Petitioner's entitlement to CTD Benefits. The remand affords Petitioner a full opportunity to present any and all evidence to support his claim for CTD Benefits under the Plan. The decision in *Flinders* fully supports the District Court's remand of this matter to the Plan administrator.

Other Tenth Circuit cases have likewise held the appropriate remedy is to remand the matter to the plan administrator. *Scruggs v. ExxonMobil Pension Plan*, 585 F.3d 1356 (10th Cir. 2009); *DeGrado v. Jefferson Pilot Financial Ins. Co.*, 451 F.3d 1161, 1175 (10th Cir. 2006); *Caldwell v. Life Ins. Co. of North Am.*, 287 F.3d 1276, 1288 (10th Cir. 2002). In *Scruggs*, the Court stated the district court was "vested with discretion to remand a case to the plan administrator for a renewed evaluation of the claimant's case." *Id.* at 1360. The Court held the district court could remand the matter to the plan administrator for *de novo* review and, in doing so, "the plan administrator was specifically authorized by the district court to present alternate reasons for denial in its re-evaluation of plaintiff's claims." *Id.*

Other Courts agree with the remedy available to a district court under such circumstances. *Gallo v.*

Amoco Corp., 102 F.3d 918, 923 (7th Cir. 1996) (a remand for further action is unnecessary only if "the case is so clear cut that it would be unreasonable for the plan administrator to deny the application for benefits on any ground"); *Hackett v. Xerox Corp. Long-Term Dis. Inc. Plan*, 315 F.3d 771, 776 (7th Cir. 2003) (remand is proper; plan administrator's failure to provide adequate findings or to explain the grounds for denial of benefits "does not mean that claimant is automatically entitled to benefits because such a holding might provide the claimant with an economic windfall should she be determined not disabled upon a proper reconsideration."); *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993).

DISTRICT COURT – REMAND COURT OF APPEALS – NO JURISDICTION

In the instant case, the District Court properly remanded the matter to the Plan administrator. The Court of Appeals properly determined it was without jurisdiction in that the District Court's remand order was not a final decision under 28 U.S.C. § 1291 and Tenth Circuit case law. This was the only decision made by the Court of Appeals. The Court of Appeals did not decide or rule on whether or not the remand for reconsideration of Petitioner's entire claim was appropriate or what the Plan administrator could or could not raise or consider on remand. The Court of Appeals simply and correctly held it was without

jurisdiction under 28 U.S.C. § 1291. Thus, this matter was not properly "in the Court of Appeals" under 28 U.S.C. § 1254, and Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should in all things be denied.

Respectfully submitted,

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